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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS DELGADO,

Defendant and Appellant.

2d Crim. No. B288869
(Super. Ct. No. 2013038223)
(Ventura County)

Nicholas Delgado appeals a judgment of conviction of first degree murder, with findings that he personally used a deadly weapon (knife), and suffered a prior serious felony strike conviction. (Pen. Code, §§ 187, subd. (a), 189, 12022, subd. (b)(1), 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)¹ We affirm.

FACTUAL AND PROCEDURAL HISTORY

This appeal concerns the murder of Alfonso Mina on September 25, 2013, as he was awakened from sleep in his apartment bedroom. Delgado forcibly entered Mina's apartment

¹ All statutory references are to the Penal Code.

and stabbed Mina multiple times, causing his death within minutes. Mina's wife and other family members were present in the apartment and several family members later identified Delgado as the assailant. Delgado and Mina were strangers and Delgado had entered the Mina apartment at random.

At trial, Delgado conceded that he stabbed Mina, but explained that he (Delgado) suffered from methamphetamine psychosis at the time of the murder. On appeal, Delgado asserts that the trial court erred by denying his motion for self-representation and by permitting the prosecutor to refer to the killing as "murder." We reject these contentions.

The Evening Preceding the Murder

The Rancho Solana apartment complex in Oxnard consists of 14 two- or three-story apartment buildings. In the evening of September 24, 2013, apartment resident Erma Barajas was leaving the laundry area when she encountered Delgado. He startled her and had a "dazed" and "blank, scary look." Barajas returned to her apartment near the laundry room. She later looked through her window and saw Delgado wearing a blanket that she had left on the clothes dryer. Barajas's daughter reported the incident to Oxnard police.

A police officer searched the laundry area and found Delgado sleeping on a nearby apartment patio. The officer awakened Delgado and asked his name. Delgado truthfully responded and added that he lived in Newhall. Delgado wore a shirt and shorts, but no shoes; a tattoo on his stomach states "Delgado." He did not appear to be under the influence of drugs or alcohol and stated that he had consumed several beers that evening. The officer urged Delgado to leave the apartment complex and offered to drive him elsewhere but Delgado declined.

That same evening, Delgado kicked the front door of another apartment. Anthony and Margaret Brown lived in an adjacent apartment. They opened their front door and informed Delgado that the apartment that he was trying to enter was vacant. Delgado then walked away. At trial, Anthony Brown described the physical attributes of the man he saw that evening. Those attributes resembled those of Delgado. Brown was not sure of his in-court identification of Delgado.

Later, Delgado walked to an apartment in which Juan Camacho and his family resided. Delgado knocked on the door and asked for a cup of water. Delgado wore only shorts and his stomach tattoo was exposed. Delgado informed Camacho that he lived in the complex. When Camacho disagreed, Delgado asked "Where do I live, then?" Camacho then gave Delgado a black shirt and closed his apartment door. Later, the Camacho family heard a loud noise, looked outside, and saw that the door to the apartment inhabited by Saleem Stephens was broken.

Stephens was asleep when awakened by the loud noise created when Delgado broke his apartment door. Stephens scrambled from his bed, ran to his hallway, and confronted Delgado. Stephens described Delgado as "a big guy," with his name tattooed on his stomach.² Delgado wore a black shirt. Stephens and Delgado were strangers; Stephens believed that Delgado was under the influence of drugs, probably methamphetamine.

Stephens grabbed Delgado in a "bear-hug," and they wrestled to the floor. Stephens's mother awoke and joined the

² At Delgado's first court appearance nearly three months later, a minute order contained this description: 25 years old, five foot eight inches tall, and 230 pounds in weight.

fight by scratching Delgado. The altercation soon ended and Delgado left the apartment by walking with his back against the wall. Delgado warned Stephens (who was African-American) to leave the neighborhood and not report the incident to police. When Delgado left the apartment, Stephens called for police assistance. Stephens later identified Delgado from a photographic lineup.

The Evening of the Murder

At approximately 9:30 p.m., on September 25, 2013, a convenience store surveillance camera depicted Delgado stealing beer from the cooler and running away. The store was located three miles from the Rancho Solana apartment complex.

Later that evening, Mina, his wife Irma Montiel, extended family members, and four children were asleep in their apartment at Rancho Solana. A noise awakened Montiel and she saw a light in the living room and then a man enter her bedroom. The man held a knife, wore shorts, and did not speak. Montiel screamed and ran to awaken her brother-in-law Lucio.

Lucio hurried to the hallway where he encountered his brother Mina, who was bleeding profusely and unable to speak. Mina then collapsed in the hallway. As Lucio attempted to help Mina, Delgado emerged from the bedroom and shoved Lucio, causing him to fall. Delgado, a stranger to Lucio, wore black shorts and did not speak as he ran from the apartment. Lucio later identified Delgado at a pretrial lineup and at trial as the man who stabbed his brother.

In response to an emergency dispatch call, Oxnard Police Detective James Crilly and his partner arrived at the Mina apartment. They found parts of the splintered front door laying on the floor and distraught relatives with "the look of people who

had been awakened in the middle of the night by something bad." Mina lay bleeding in the hallway; Crilly was unable to find Mina's pulse and could not detect any respiration. Paramedics soon arrived and pronounced Mina dead.

Police field evidence technicians collected DNA evidence from Mina's left hand. A sheriff's department forensic scientist compared the DNA profile from Mina's samples with that taken from Delgado. The analysis concluded that Delgado was a minor contributor to the DNA samples taken from Mina. The possibility of a randomly selected Hispanic person being the minor contributor was 1 in 34 quadrillion for one sample and 1 in 210 trillion for the second sample.

A kitchen knife from the Mina household was later found embedded in dirt outside the apartment. Analysis of the knife yielded no DNA profile or blood evidence.

On September 27, 2013, Ventura County Medical Examiner Ann Bucholtz performed an autopsy on Mina and determined that he died from multiple stab wounds. Bucholtz observed 15 sharp-force injuries to Mina's arm, chest, neck, and hand. One wound punctured Mina's heart and several others entered his chest cavity. The wounds varied in depth, but three of the chest wounds were between three and one-half and eight inches deep. Bucholtz opined that the manner of Mina's death was homicide.

Delgado presented evidence at trial that he was a longtime methamphetamine user. Witnesses testified that Delgado used methamphetamine and marijuana frequently in 2013, becoming agitated and paranoid at times.

Delgado testified that he used methamphetamine daily and increased his usage in 2013. He stated that on September 24, 2013, he heard voices directing him to the Rancho Solana

apartment complex. He admitted to the encounters with different residents that evening and explained that he was looking for his apartment. Delgado testified that he then left the apartment complex and performed casual labor the following day, earning cash to buy methamphetamine. Voices directed him to steal beer from the convenience store and then return to the Rancho Solana apartments to find his apartment.

The voices then told him to enter the Mina apartment and take a knife from the kitchen. He entered Mina's bedroom and stabbed him because he (Delgado) believed it was his apartment. Delgado testified that he "didn't mean to [stab Mina]." He explained that Mina's wife began to scream, Mina awoke and "got up towards [him]," and that the two men "engag[ed]." Delgado stated that he then left the apartment building, used more methamphetamine, and made his way to his brother's home.

Robert Bridge, Delgado's brother, testified that Delgado was not coherent and complained of hearing voices that evening. Bridge drove Delgado to the police station "to sober up" as he was in violation of his existing probation.

Expert witness Doctor Andrew Kim, a forensic psychiatrist, testified that he interviewed Delgado and reviewed his medical records and the police reports. Kim opined that Delgado suffered from methamphetamine-induced psychosis at the time of the murder.

The trial court declared a mistrial for juror misconduct during the first trial. Following a second trial, the jury convicted Delgado of first degree murder and also found that he personally used a deadly weapon, a knife. (§§ 187, subd. (a), 189, 12022, subd. (b)(1).) In an earlier proceeding, Delgado admitted that he suffered a prior serious felony strike conviction. (§§ 667, subds.

(b)-(i), 1170.12, subds. (a)-(d).) The trial court sentenced Delgado to a prison term of 51 years to life, imposed a \$10,000 restitution fine, and a \$10,000 parole revocation restitution fine (suspended), ordered victim restitution, and awarded Delgado 1,611 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45.)

Delgado appeals and contends that: 1) the trial court erred by denying his motion for self-representation pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), and 2) the trial court erred by permitting the prosecutor to refer to the charged crime as "murder."

DISCUSSION

I.

Delgado argues that the trial court impermissibly denied his unequivocal, knowing, intelligent, and voluntary demand to represent himself. (*Faretta, supra*, 422 U.S. 806, 835.) He points out that erroneous denial of a *Faretta* motion is an error of constitutional dimension compelling per se reversal of the conviction. (*People v. Becerra* (2016) 63 Cal.4th 511, 520.)

On June 26, 2017, the trial court declared a mistrial of Delgado's first trial due to juror misconduct. Approximately four months later, on November 1, 2017, Delgado moved to represent himself.

In response to the trial court's questions, Delgado stated that he was 28 years old, completed 11th grade in school, studied California criminal law in the law library with "minimal" access, and knew that the Evidence Code existed ("I just know there is law that pertains to stuff like that"). Delgado acknowledged that he was required to follow court rules and procedures and that the court would not assist him. Delgado referred to the prior four years pending trial and stated: "I feel I'm up to speed. . . . I

know I'm ready for it." He stated that he was aware of the disadvantages of self-representation and understood his constitutional rights regarding trial.

Delgado then requested "a little bit more time" to consider discovery, "at least a month" or "at least four weeks" to "study" the "paperwork."

The trial court acknowledged Delgado's absolute fundamental right to represent himself, but exercised its discretion to deny the motion. The trial judge stated: "I find in the exercise of my discretion, giving heavy weight to your right I'm also weighing very heavily . . . your lack of any legal training or experience, the level of your education and some rather detailed evaluations and assessments by Dr. Kim." The judge added that delay "was very much at the bottom end" of the considerations but had stated earlier that any delay was "important for [the court] to know." The second trial then commenced four court days later with juror voir dire.

To invoke the constitutionally mandated unconditional right of self-representation, a defendant in a criminal trial should unequivocally assert that right within a reasonable time prior to trial. (*People v. Smith* (2018) 4 Cal.5th 1134, 1182; *People v. Windham* (1977) 19 Cal.3d 121, 127-128.) Following a timely motion, "a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be." (*Windham*, at p. 128.) The defendant's technical legal knowledge is irrelevant to the court's assessment of the defendant's knowing exercise of the right to defend himself. (*Ibid.*)

Once a defendant has chosen to proceed to trial represented by counsel, demands that he be permitted to discharge counsel and represent himself are addressed to the court's discretion. (*People v. Buenrostro* (2018) 6 Cal.5th 367, 425.) Timeliness for purposes of a *Faretta* motion is not a fixed and arbitrary point in time, but considers the totality of the circumstances in the case at the time the motion is made. (*Buenrostro*, at p. 426 [timeliness requirement exists to prevent defendant from unjustifiably delaying trial or obstructing the orderly administration of justice].) There is no "Pythagorean 'secret magic of numbers' " to determine whether a motion is timely. (*People v. Ruiz* (1983) 142 Cal.App.3d 780, 790.) Generally, *Faretta* motions made long before trial are timely and those made "on the eve of trial" are not. (*People v. Lynch* (2010) 50 Cal.4th 693, 722-723 [the government's interest in ensuring the integrity and efficiency of the trial may outweigh the defendant's interest in acting as his own counsel], abrogated in part on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.) The totality of circumstances includes whether trial counsel is ready for trial, the availability of witnesses, the complexity of the case, and whether the defendant had earlier opportunities to assert his right of self-representation. (*Id.* at p. 726.)

Here the trial court did not abuse its discretion by denying Delgado's *Faretta* motion because it was made on the eve of trial. (*People v. Buenrostro*, *supra*, 6 Cal.5th 367, 427 [collecting decisions where *Faretta* requests were untimely]; *People v. Smith*, *supra*, 4 Cal.5th 1134, 1182 [abuse of discretion occurs if ruling is unreasonable].) Delgado failed to take advantage of earlier opportunities to assert his *Faretta* rights; the first trial ended in a mistrial and there were numerous pretrial hearings during the

next four months in which defendant was present in court. (*People v. Valdez* (2004) 32 Cal.4th 73, 102 [*Faretta* motion should be made at defendant's "earliest available opportunity"].) Moreover, counsel informed the court that expert witness Kim would not be available later in the month and expressed concern whether Delgado could reschedule Kim or obtain another expert.

Although the trial court may have accorded less weight to the timeliness factor, the record as a whole establishes that the court did not abuse its discretion by denying the *Faretta* motion. (*People v. Dent* (2003) 30 Cal.4th 213, 218 ["Even though the trial court denied the [*Faretta*] request for an improper reason, if the record as a whole establishes defendant's request was nonetheless properly denied on other grounds, we would uphold the trial court's ruling"].)

Delgado relies upon *Van Lynn v. Farmon* (9th Cir. 2003) 347 F.3d 735, 737, to argue that we should review the trial court's ruling denying a timely *Faretta* motion only for its stated reasons. We are bound to follow the general rule of *People v. Dent, supra*, 30 Cal.4th 213, 218, however, and uphold the ruling if the record establishes the motion was properly denied on other grounds. Here the trial court did consider the timeliness of Delgado's motion as "important," although it accorded the factor less weight.

II.

Delgado contends that the trial court erred by permitting, over defense objection, the prosecution and its witnesses to refer to the charged crime as "murder." He asserts that the reference constituted improper opinion evidence and invaded the province of the jury.

Although a killing should not be characterized as a murder in advance of a verdict, Delgado has not established prejudicial error. (*People v. Price* (1991) 1 Cal.4th 324, 480 [improper for prosecutor to use term “murder” in questioning witness regarding unadjudicated killing], superseded by statute as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161; *People v. Garbutt* (1925) 197 Cal. 200, 209 [prosecutor should reserve for argument that a killing was murder].) The trial court instructed regarding the elements of the offenses and the requirement of proof beyond a reasonable doubt. We presume that jurors understand and follow the instructions given. (*People v. Buenrostro, supra*, 6 Cal.5th 367, 431.) Moreover, evidence at trial established that Delgado possessed the intent to kill Mina in view of the deep and many stab wounds to Mina's heart and lungs. (*Price*, at p. 480 [reference to murder not grounds for reversal where the evidence supported a finding of murder].)

The judgment is affirmed.

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GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Matthew P. Guasco, Judge

Superior Court County of Ventura

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